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No. 08-916

IN THE

Supreme Court of the United States

VFJ VENTURES, INC., f/k/a VF JEANSWEAR, INC.,

Petitioner,

v.

G. THOMAS SURTEES,
in his official capacity as Commissioner of the Department of Revenue for the State of Alabama, and the
ALABAMA DEPARTMENT OF REVENUE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing a membership of more than three million businesses and organizations of every size and in every industry sector and region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases in this Court addressing issues of vital concern to the Nation's business community, and has regularly participated in cases involving the Commerce Clause.

The Chamber has a substantial interest in this case because add-back statutes similar to the Alabama statute at issue in this case have proliferated throughout the Nation, and businesses in all sectors of the economy are disadvantaged by the abuse of state tax laws to regulate out-of-state business activities and to interfere with the tax policies of sister states. Alabama's add-back statute penalizes Alabama corporate taxpayers that are

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its counsel or its members, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith. Counsel for *amicus* also represent that counsel of record for all parties received notice of *amicus*'s intention to file this brief at least 10 days prior to the due date.

affiliated with corporations in other states that do not share Alabama's tax policy on trademark royalty fees. In practical effect, Alabama discourages multi-state enterprises that have a taxable presence in Alabama from locating trademark properties in sister states that are not marching in lockstep with the Alabama Legislature, and seeks to undermine the tax policies of sister states that, like Delaware, choose to adopt pro-business taxing regimes. The Chamber is filing this *amicus* brief because its members have a strong interest in healthy competition among the states to attract business activities and in the recognition and enforcement of federal constitutional principles that facilitate interstate commerce and prevent one state from imposing its public policy agenda on any other state.

SUMMARY OF ARGUMENT

This case squarely presents two important questions regarding the limits that the Constitution places on the power of a single state to project its tax policy extraterritorially:

1. Consistent with dormant Commerce Clause principles, does the State of Alabama have a legitimate interest in imposing a tax penalty on an Alabama corporate taxpayer solely because the Alabama taxpayer makes legitimate royalty payments to an affiliated entity that is not taxed on the resulting income under the laws of a sister state?

2. Does the Alabama add-back statute unlawfully burden interstate commerce by projecting Alabama's tax policy nationwide?

The Alabama add-back statute at issue is irreconcilable with the Commerce Clause because the statute is not linked to any legitimate Alabama interest in determining corporate income fairly allocable to commercial activities within Alabama's borders for Alabama tax purposes. In practical effect, the add-back statute: (1) penalizes corporations that are domiciled or do business in Alabama solely on the basis that they are affiliated with out-of-state corporations that have chosen to domicile themselves in states that do not share Alabama's trademark royalty tax policy, and (2) attempts to coerce sister states to fall into lockstep with Alabama's legislative judgments regarding corporate taxation by stripping away the competitive advantages of states that do not share Alabama's tax policies.

Alabama's add-back statute denies corporations an income tax deduction for royalty payments made to affiliated corporations located in states that do not share Alabama's policy of taxing income derived from royalty payments for intangible assets. *See* Ala. Code § 40-18-35(b). Here, the add-back statute operated to deny Petitioner VFJ Ventures, Inc. ("VFJ") a tax deduction solely on the ground that VFJ made royalty payments to affiliated corporations domiciled in Delaware—a state that, unlike Alabama, does not tax income derived from royalty payments. Notwithstanding that the payments were made to affiliated entities, there is no question that VFJ's royalty payments were legitimate business expenses incurred at market rates. Indeed, had VFJ made the same types of payments to unaffiliated entities or to affiliated entities located in Alabama or any other state that shares Alabama's policy of taxing royalty income, VFJ would have been entitled to the deduction. Notwithstanding this manifest intent to regulate business activity and state policies beyond Alabama's borders, the Alabama Supreme Court held that the add-back provision does not violate the Commerce Clause.

The Alabama Supreme Court's holding collides with established Supreme Court precedent that the Commerce Clause and the limit on sovereignty exercised by individual states within the federal union impose fundamental limits on each state's power to regulate extraterritorial commercial activity and to project its laws into other jurisdictions. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989). By directly linking what is, in effect, a surcharge on certain corporate taxpayers in Alabama to the tax policies of other states in which the taxpayer's corporate affiliates are located, the Alabama add-back statute violates both of these

fundamental limits. *See New Energy Co. v. Limbach*, 486 U.S. 269, 274-75 (1988). *First*, the add-back statute impermissibly regulates interstate commerce by discouraging Alabama corporate taxpayers from licensing trademarks from affiliated corporations located in states that do not share Alabama's tax policy. The statute further penalizes multi-state corporate entities for electing to hold their trademarks in states that do not share Alabama's tax policy. By discriminatorily taxing in-state economic activity on the basis of criteria that relate solely to commercial activity that occurs wholly outside the state's jurisdiction, the Alabama add-back statute violates the Commerce Clause. *See, e.g., Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983).

Second, the add-back statute projects Alabama's tax policy beyond Alabama's borders and infringes upon the policy choices of other states by incentivizing those states to adopt the same tax policies as Alabama or suffer the consequences. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-72 (1996). As applied here, the Alabama statute impermissibly undercuts the ability of Delaware and other states to compete for business presence by offering to lower business taxes, and coerces them to fall into lockstep with Alabama's legislative judgments. Consistent with this Court's precedent, Alabama cannot link the application of its add-back statute to the tax policies of other states without violating fundamental limits on its power to tax commercial activity. The Court should grant the petition to reverse the decision below and reject Alabama's attempt to project its tax policies nationwide in excess of its sovereign jurisdiction and in derogation of dormant Commerce Clause principles.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE ALABAMA TAX STATUTE IMPERMISSIBLY SEEKS TO REGULATE COMMERCIAL ACTIVITY THAT OCCURS ENTIRELY BEYOND THE STATE'S BORDERS.

Alabama's add-back statute violates the Commerce Clause by linking the amount of an Alabama corporate taxpayer's liability not to its economic activity in Alabama, but instead to the tax status of affiliated entities located in other states. Whenever an Alabama corporate taxpayer happens to be affiliated with an out-of-state corporate entity to which the Alabama taxpayer has made royalty payments, the Alabama taxpayer's eligibility to deduct those payments turns solely on the tax policies adopted by the sister state in which the out-of-state entity is domiciled. Because Alabama has no legitimate income apportionment interest in tying the Alabama taxpayer's eligibility for a deduction to its affiliation with an out-of-state entity and the taxation of that entity under another state's law, the statute's undeniable purpose and effect is to impermissibly regulate conduct in violation of the Commerce Clause.

The Commerce Clause "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden" interstate commerce. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). It is well-established that the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or

not the commerce has effects within the State." *Healy*, 491 U.S. at 336 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion)). "[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* The "critical inquiry" is "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* Consistent with these fundamental principles, a state only has a legitimate interest in taxing commercial activity that occurs within the state's borders. *See Container Corp.*, 463 U.S. at 164 ("Under both the Due Process and the Commerce Clauses of the Constitution, a state may not, when imposing an income-based tax, tax value earned outside its borders." (internal quotation marks omitted)); *see also Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (stating that a tax may only be "applied to an activity with a substantial nexus with the taxing State").

Like most states, Alabama imposes an income tax on corporations that are domiciled or do business in Alabama. *See* Ala. Code § 40-18-2(a). Although Alabama law generally permits an income tax deduction for royalty payments that corporations make for the right to use intangible assets (here, the Lee and Wrangler trademarks), the add-back statute expressly denies the deduction and thus surcharges Alabama taxpayers that make payments to "related members" of an affiliated group unless the income from these payments is "[s]ubject to tax based on or measured by the related member's net income in Alabama or any other state."

Id. § 40-18-35(b)(1).[2] Alabama taxes income from royalty payments for intangible assets, *id.* § 40-27-1, art. IV, 1(a), but certain other states, including Delaware, do not.

Based on its operation of manufacturing facilities in Alabama, Petitioner VFJ filed an Alabama income tax return for the 2001 tax year. During that year, VFJ made royalty payments to Lee and Wrangler, Delaware corporations that are "related" to VFJ within the meaning of Alabama's add-back statute. After VFJ deducted the royalty payments from its Alabama income, Alabama's Department of Revenue determined that the add-back statute applied because, notwithstanding that the royalty payments were ordinary and necessary expenses made at market rates, the income that Lee and Wrangler earned through the payments was not taxed in Delaware.

Under the Alabama add-back statute, VFJ's eligibility for a tax deduction for royalty payments is ultimately linked not to VFJ's commercial activity within Alabama, but to the application of sister state tax policies that have nothing to do with VFJ's economic activity in Alabama and thus cannot properly be considered in formulating Alabama tax policy. Specifically, the add-back statute places a differential burden on VFJ solely because it made payments to "related members"—here, Lee and Wrangler—located in Delaware as opposed to Alabama or another state

2. A "related member" is defined to include entities in any commonly owned corporate group that includes the taxpayer. *See id.* § 40-18-1(29).

that shares Alabama's tax policy. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 202 (1994) ("For over 150 years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce . . . is invalid . . . ."). If Lee and Wrangler were located in Alabama or another state that, like Alabama, taxes royalty payments for intangible assets, then the add-back provision would not apply, and the deduction would be available to VFJ. Because Lee and Wrangler are located in Delaware, which does not tax earnings from royalty payments, the add-back provision denies VFJ the income tax deduction.

In operation, the add-back statute is a Trojan Horse that uses a multi-state entity's taxable presence in Alabama to capture additional tax revenues based solely on Alabama's assessment of a separate taxing policy that has nothing to do with commercial activity that takes place inside Alabama's borders. *See Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940) ("The commerce clause forbids discrimination, whether forthright or ingenious."). As one of 50 states in a federal union, Alabama has no legitimate interest in linking the applicability of the add-back statute to the tax policies adopted by sister states. Consistent with this Court's precedent, *see Container Corp.*, 463 U.S. at 164, Alabama's legitimate interest in taxing commercial activity ends at the Alabama state line, and Alabama is forbidden from taxing in-state economic activity on the basis of criteria (in this case, the tax burden imposed by a sister state on an out-of-state entity) that relates solely to tax policy adopted outside Alabama's borders. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992) (holding that "a vendor whose only contacts with the

taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause"). Alabama's add-back statute is not concerned with the tax implications of VFJ's commercial activities *in Alabama,* because VFJ's ability to claim the tax deduction and avoid the add-back statute does not depend on VFJ's activities within the State of Alabama. The economic effect of trademark royalty payments on the income of an Alabama taxpayer like VFJ is the same regardless of whether the entity to which the taxpayer pays the royalties is from Delaware or another state. By making the taxpayer's liability dependent upon (1) whether the taxpayer is part of a multi-state corporate enterprise; and (2) whether the affiliated recipient of the royalty payments is taxed on the income arising from the payments by a sister state, Alabama is not seeking to measure income attributable to Alabama activities, but rather to tax indirectly the income of some out-of-state corporate entities, but not others.[3]

Alabama is, of course, free to satisfy itself that an Alabama corporate taxpayer is not engaged in a "sham" transaction to avoid Alabama taxes by improperly diverting revenues earned from the taxpayer's economic

3. The Chamber does not concede that, in the circumstances presented, Alabama has any authority to tax Lee and Wrangler directly on royalties paid by Alabama entities. However, even assuming that Alabama had such authority and had chosen to exercise it, *see, e.g., Lanco, Inc. v. Director*, 908 A.2d 176 (N.J. 2006) (per curiam); *Geoffrey, Inc. v. S.C. Tax Comm'n*, 437 S.E.2d 13 (S.C. 1993), the Commerce Clause prohibits Alabama from discriminating against Alabama taxpayers based solely on whether they are affiliated with multi-state entities or domiciled in particular states.

activities within the state. However, consistent with dormant Commerce Clause principles, Alabama does not have a legitimate interest in discriminatorily adjusting the Alabama entity's tax burden based solely on the tax status of an affiliated, out-of-state entity when royalty payments made by an unaffiliated Alabama entity to the same out-of-state payee would be fully deductible. Put another way, Alabama cannot claim to have a *bona fide* interest in discriminatorily taxing an Alabama entity on the ground that an out-of-state affiliate of the Alabama entity has chosen to operate in a state that has adopted a different tax regime than that of Alabama.

"[T]he practical effect" of the Alabama add-back statute "is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336. By linking to the tax policies of other states and denying a tax deduction to Alabama corporate taxpayers that are affiliated with corporations that have elected to domicile themselves in sister states that impose lower tax burdens, the add-back statute penalizes Alabama corporate taxpayers solely on the basis that they are affiliated with out-of-state corporations that have chosen to hold intellectual property in states that do not share Alabama's tax policy. *See Edgar*, 457 U.S. at 643 (invalidating Illinois law governing tender offers that "purport[ed] to regulate directly and to interdict interstate commerce, including commerce wholly outside the State"). The statute therefore discourages Alabama corporate taxpayers from making royalty payments to or doing business with affiliated entities located in states that do not share Alabama's tax policy. *See, e.g.*, *Fulton Corp. v. Faulkner*, 516 U.S. 325, 343-44 (1996) (holding that North

Carolina's intangibles tax "worked an impermissible result" because a "North Carolina investor will probably favor investment in corporations doing business within the State" (citing cases)). The Alabama statute also deters multi-state corporations from organizing their affairs to minimize the costs associated with interstate commerce (including tax burdens), because the statute makes clear that Alabama intends to capture tax receipts that sister states elect to leave on the table. *See Healy*, 491 U.S. at 341 (noting that Connecticut's price-affirmation statute created disincentives to engage in interstate commerce).

In substance, the extraterritorial consequences of Alabama's add-back statute are no different from the price-affirmation statute struck down by this Court in *Healy*. The Connecticut statute at issue in *Healy* required out-of-state shippers of beer to affirm that their prices in Connecticut were no higher than prices in bordering states. As the Court described it, the price affirmation statute linked "Connecticut beer prices to the prices charged in the border States." *Id.* at 326; *see also Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986) (invalidating New York price-affirmation statute). According to the *Healy* Court, the Connecticut law had "the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State" because it locked in beer prices in neighboring states and prevented sellers from reducing their prices outside Connecticut based on local market conditions. 491 U.S. at 337. The Court recognized that the statute "establishes a substantial disincentive for companies doing business in Connecticut to engage in interstate commerce,

essentially penalizing Connecticut brewers if they seek border-state markets and out-of-state shippers if they choose to sell both in Connecticut and in a border State." *Id.* at 341. The Court had no doubt that this impermissible effect was caused by linking the price-affirmation statute to out-of-state prices. Connecticut's price-affirmation statute, like others, "short-circuit[ed] normal pricing decisions based on local conditions" because it "linked in-state prices to the lowest price in any [bordering] State." *Id.* at 340; *see also id.* at 343 (noting that "[b]y tying maximum future prices in one State to the lowest prices in other States," "affirmation laws control pricing decisions in nonaffirmation States").

Just as the price affirmation statute in *Healy* penalized local brewers for doing interstate business by making it impossible to lower prices in border states, the Alabama add-back provision creates disincentives to participate in interstate commerce by penalizing Alabama corporate taxpayers for doing business with affiliates located in states that do not share Alabama's tax policies. That Alabama relies on tax policy, rather than price controls, to pursue its extraterritorial ambitions does not distinguish this case from *Healy*. Indeed, consistent with *Healy*, this Court has invalidated state tax laws that, like Alabama's add-back statute, link the availability of tax benefits to the tax laws of other states. *See New Energy Co.*, 486 U.S. at 274-75 (holding that an Ohio law that denied a tax credit for ethanol produced in states that did not grant similar tax advantages for ethanol produced in Ohio violated the Commerce Clause); *see also Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1829 (2008) (Kennedy, J., dissenting) (arguing that a state should not be permitted

"to condition tax-free treatment of out-of-state bonds on reciprocal treatment in another State, leading to the discrete market blocs the Constitution was designed to eliminate" (citation omitted)).

The Alabama Supreme Court addressed the wrong issue and ignored the pernicious effects of the add-back statute on interstate commerce when it concluded that the statute "does not benefit in-state corporations to the detriment of, or disproportionately to, out-of-state corporations." Pet. App. 62a. As *Healy* shows, Alabama simply cannot, consistent with dormant Commerce Clause principles, link the applicability of the add-back provision to other states' tax policies. Moreover, the Alabama Supreme Court's defense of the statute based on the concept of *proportionality* is a red herring. *Id.* at 60a-61a. The question presented is not one of degree, but a categorical, threshold question whether, as a matter of constitutional first principles, Alabama has the power to link the applicability of its add-back statute to and collect tax revenue based solely on the tax policies applicable to entities incorporated in sister states. The Court should grant the petition because the Alabama add-back statute seeks to regulate commercial activity and dictate tax policy outside the borders of Alabama and invites other states to manipulate their tax regimes to discriminate against sister states on the basis of their taxing regimes.

II. CERTIORARI SHOULD BE GRANTED FOR THE INDEPENDENT REASON THAT THE ALABAMA ADD-BACK STATUTE PROJECTS ALABAMA TAX POLICY EXTRATERRITORIALLY IN VIOLATION OF THE INHERENT LIMITATIONS ON STATE SOVEREIGNTY AND THE COMMERCE CLAUSE.

The Alabama add-back statute is unconstitutional for the independent reason that it violates the well-established principle that no state has the authority to project its legal or policy judgments nationwide. By doing so, Alabama impermissibly attempts to coerce sister states to fall into lockstep with Alabama's legislative judgments regarding corporate taxation and strips sister states of their ability to compete for business activity in interstate commerce.

By virtue of their joinder in a federal union, the states are fundamentally limited in their ability to "project[] one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 337; *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) ("New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."). This Court has long held that state "[l]aws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extra-territorial effect only by the comity of other states." *Huntington v. Attrill*, 146 U.S. 657, 669 (1892). In particular, it is "impossible to permit the statutes of [a State] to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits

of their lawful authority and upon the preservation of which the Government under the Constitution depends." *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914); *see also Gore*, 517 U.S. at 571 ("No State can legislate except with reference to its own jurisdiction . . . . Each State is independent of all the others in this particular." (quoting *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881))); *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.").

This Court's decisions therefore "reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy*, 491 U.S. at 335-36; *see also Fulton*, 516 U.S. at 334 n.3 ("promotion of in-state markets at the expense of out-of-state ones furthers the 'economic Balkanization' that our dormant Commerce Clause jurisprudence has long sought to prevent"). Indeed, "[a] basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2002). This Court has rejected efforts by one state to encourage the other 49 states to adopt similar policies by discriminating against interstate commerce. *See New Energy Co.*, 486 U.S. at 274 (rejecting argument that "the availability of the tax

credit to some out-of-state manufacturers . . . shows that the Ohio provision, far from discriminating against interstate commerce, is likely to promote it, by encouraging other States to enact similar tax advantages that will spur the interstate sale of ethanol"). Accordingly, regardless of legislative intent, federal courts have a unique obligation to ensure that one state does not impose its law and public policy on any of the other 49 states or on the operation of interstate commerce.

Here, the pernicious effect of Alabama's add-back statute does violence to the fundamental principles of state sovereignty and comity that underpin the Commerce Clause. The add-back statute projects Alabama's policies regarding corporate taxation into sister states by burdening their own tax policy choices and coercing them to adopt Alabama's legislative judgments or suffer the consequences. *See Gore*, 517 U.S. at 572 ("But by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States."); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 379 (1976) (a state "may not use the threat of economic isolation as a weapon to force sister States to" adopt its own legislative judgments). Under the Alabama Supreme Court's view, Alabama is free to manipulate its own scheme of tax deductions to capture additional tax revenue from multi-state corporate entities whenever it concludes that a sister state has unreasonably or unfairly conferred a tax advantage on the out-of-state affiliates of Alabama corporate taxpayers. If sister states do not fall in line and modify their tax regimes to mirror the tax regime adopted by Alabama, any decisions that sister states

make to extend favored tax treatment to multi-state corporate entities doing business in their jurisdictions will be undermined in whole or in part by Alabama's predatory tax stratagem. Alabama's add-back statute effectively uses the concept of corporate affiliation to capture taxes in a discriminatory manner based on whether Alabama believes taxes should be assessed on affiliated corporate taxpayers by other states (here Delaware). While the add-back statute has the appearance of an anti-evasion provision because it is currently limited to payments made to out-of-state related entities, the court below acknowledged that an anti-evasion rationale was both inapplicable to this case and redundant, because Alabama law already permits excessive royalty payments to be disallowed as deductions. Pet. App. 35a-36a. Under the rationale adopted below, Alabama could lawfully choose to apply its add-back statute without regard to affiliation.

To the extent that the Alabama add-back statute acts to coerce sister states to fall in line or suffer the consequences, the statute undermines "the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 129 S. Ct. 711, 718-19 (2009); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs."). In particular, the add-back statute strips sister states of their ability to compete in interstate commerce by negating the competitive and economic advantages that states such as Delaware have held out to intellectual property owners in contrast to Alabama's policy of

taxing royalty payments. *See, e.g.*, *Brown-Forman*, 476 U.S. at 580 (noting that a State "may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess"). If Delaware offers tax-favored treatment to the Delaware domiciliary of a multi-state enterprise that also has a taxable presence in Alabama, the Alabama add-back statute blunts the Delaware incentive by taxing the enterprise's related, Alabama domiciliary. The statute concomitantly interferes with the freedom of choice of business enterprises such as Lee and Wrangler by undermining or negating the tax advantages that they realized when they elected to locate in states that, like Delaware, do not share Alabama's tax policies. *See Healy*, 491 U.S. at 339 ("States may not deprive businesses and consumers in other States of 'whatever competitive advantages they may possess' based on the conditions of the local market.").

This case is an ideal vehicle for the Court to reinforce the limits on the power of individual states to interfere with interstate commerce through the use of discriminatory state tax policies to regulate out-of-state activities and defeat sister state tax incentive regimes. Because illegitimate and inherently discriminatory statutes similar to the Alabama add-back statute have proliferated nationwide, *see* Pet. 27, this Court's intervention is warranted to reaffirm the constitutional prohibition on "the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Healy*, 491 U.S. at 337. The proliferation of these statutes, in light of state efforts to discriminate against interstate commerce on a whole host of fronts, *see, e.g.*, *Granholm v. Heald*, 544 U.S.

460 (2005), contributes to the "economic Balkanization" that this Court has sought to prevent. Indeed, in a time of economic difficulty when states may seek to foster local business activity by applying favorable tax and regulatory policies within their borders, and sister states may be tempted to offset and deter such initiatives by burdensome impositions on affiliated entities within their borders, review by this Court is imperative.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and reverse the decision of the Alabama Supreme Court.

Respectfully submitted,

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